



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

200 PORTLAND STREET  
BOSTON, MASSACHUSETTS 02114

TOM REILLY  
ATTORNEY GENERAL

(617) 727-2200  
<http://www.ago.state.ma.us>

May 9, 2003

Sent via e-mail, hand delivery and/or U.S. Mail

Mary L. Cottrell, Secretary  
Massachusetts Department of Telecommunications and Energy  
One South Station, 2nd Floor  
Boston, MA 02110

Re: Funding Mechanism Rulemaking For Wireline E-911, D.T.E. 03-24

Dear Ms. Cottrell:

The Attorney General submits these reply comments to the Massachusetts Department of Telecommunications and Energy ("Department" or "DTE") in response to comments submitted orally at the April 30, 2003 public hearing or in writing by the Massachusetts Communications Supervisors Association ("MCSA"), the City of Cambridge Emergency Communications Department ("Cambridge"), the Massachusetts Statewide Emergency Telecommunications Board ("SETB"), AT&T Communications of New England, Inc. ("AT&T"), and Verizon New England, Inc., d/b/a Verizon Massachusetts ("Verizon") (collectively, "Commenters").<sup>1</sup>

All Commenters agree on the need for adequate funding of enhanced 911 services, relay services for TDD/TTY users, communications equipment for disabled persons, and pay telephone amplification (collectively "E911 services"). Several Commenters seek to revise the existing standard of review for determining whether proposed E911 services expenses are prudent expenditures and in the public interest, as required by G.L. c. 6A, § 18H.<sup>2</sup> A review of

---

<sup>1</sup> Except as specifically modified in these reply comments, this review has not caused the Attorney General to change any of his positions set forth in his April 22, 2003 comments. No attempt has been made to respond to all of the arguments made and positions taken by the Commenters. Silence regarding any specific argument raised in the Commenters' initial comments should not be taken as agreement by the Attorney General.

<sup>2</sup> "The department of telecommunications and energy shall promulgate rules providing for ... the  
(continued...)"

that standard is, therefore, appropriate. Furthermore, the Department should revise its proposed regulations to require all telephone companies to apply excess directory assistance revenues collected after December 31, 2002, to their outstanding E911 deficit.

#### **A. The Department's Standard of Review For Prudent E911 Expenditures**

The Department's standard of review for determining whether to approve SETB expenses for E911 services is well established. The Department will approve SETB-recommended expenditures if they are "prudently incurred" expenses and are in the public interest. *New England Telephone and Telegraph Company*, D.P.U. 91-68, p. 3 (1991); *Statewide Emergency Telecommunications Board*, D.P.U./D.T.E. 97-87, p. 5 (1998); *Petition by the Statewide Emergency Telecommunications Board*, D.T.E. 98-103, p. 4 (1999); and *Petition by the Statewide Emergency Telecommunications Board*, D.T.E. 00-58, p. 4 (2000).

In assessing the reasonableness of SETB E911 expenses, the Department must develop and review a record to ensure that the proposed expenditures and revenues are consistent with Department precedent and in the public interest. See *N.E.T.*, D.P.U. 91-68; *S.E.T.B.*, D.T.E. 00-58. The Department evaluates "prudence" based on a comparison of how a reasonable company would have responded to the particular circumstances and whether the company's actions were in fact prudent in light of all circumstances that were known or reasonably should have been known when the company made the decision. *Boston Edison Company*, D.P.U. 906, p. 165 (1982); *Western Massachusetts Electric Company*, D.P.U. 85-270, pp. 23-24 (1986); *Boston Gas Company*, D.P.U. 93-60, pp. 24-25 (1993); *Fitchburg Gas and Electric*, D.T.E. 02-24/24, pp. 36-37 (2002).

This determination should not be made based on hindsight judgments, nor is it appropriate for the Department merely to substitute its best judgment for the judgments made by the management of the utility. *Attorney General v. Dep't of Pub. Utils.*, 390 Mass. 208, 229 (1983); *Boston Gas Company*, D.P.U. 93-60. Prudence does not depend on whether budget estimates later proved to be accurate, but rather upon whether the assumptions made were reasonable, given the facts that were known or that should have been known at the time. *Fitchburg Gas and Electric Light Company*, D.P.U. 84-145-A, p. 26 (1985); *Boston Gas Company*, D.P.U. 93-60, at 35 (1993); *Massachusetts-American Water Company*, D.P.U. 95-118, pp. 39-40 (1996); *Fitchburg Gas and Electric*, D.T.E. 02-24/24.

#### **B. The Department Should Not Create A Special Standard For E911 Expense Reviews**

The MCSA, in its initial comments, asks the Department to revise its proposed E911 Funding Regulations (Section 16.03(1)) to include specific categories of E911 service expenses

---

<sup>2</sup>(...continued)

funding of prudently incurred expenses ... and shall address in the report [to the General Court] the reasonableness of the capital expenditures and related expenses of the statewide emergency telecommunications board incurred in complying with chapter 166, section 14A and 15E." G.L. c. 6A, § 18H.

as “prudently incurred costs.” MCSA Comments, p. 4. Furthermore, the MCSA and the SETB propose a “reasonable, customary or necessary” standard for determining whether expenses are prudent. *Id.*, p. 4 (citing Section 16.03(9)); Tr., pp. 10-11. The costs in the categories suggested by the MCSA and the Board may, under the appropriate circumstances, qualify as prudent expenses that are made in the public interest; however, that may not always be the case.<sup>3</sup>

The Department should adhere to its established precedent and decline to adopt new or blanket definitions of “prudently incurred costs.” The Department cannot make those determinations categorically; rather, the SETB, in presenting its record of expenditures before the Department, will have to demonstrate that each and every E911 expense was a prudent expenditure given the specific circumstances, and was made in the public interest. *Fitchburg Gas and Electric*, D.T.E. 02-24/24, pp. 36-37 (2002); *Attorney General v. Dep’t of Pub. Utils.*, 390 Mass. 208, 229 (1983). Only then will the Department have a complete record on the individual costs before passing judgment. *S.E.T.B.*, D.T.E. 00-58 (2000). The Department should not revise the standard of review for prudent expenditures as the MCSA and the SETB propose to Section 16.03(1), Section 16.03(5) and in new Section 16.03(9).

**C. The Department’s Regulations Should Require Telephone Companies To Apply Their Excess Directory Assistance Revenues To Their Outstanding E911 Deficits**

Chapter 239 of the Acts of 2002 permits the Department to determine the portion of directory assistance revenues the companies will use to offset any deficit they incur prior to January 1, 2003, including any interest that the Department may determine should be applied. Neither Chapter 239 nor the proposed Department regulations, however, address directory assistance revenues that telephone companies have collected since December 31, 2002, in excess of the call allowances set forth in G.L. c. 159, §19A.<sup>4</sup>

The Department indicated during the April 30, 2003 public hearing that any wireline E911 services deficit accruing from January 1, 2003, until implementation of the interim E911 wireline surcharge amount will be accounted for in the interim charge. Tr., pp. 35-36. Chapter 239 of the Acts of 2002 did not eliminate the telephone companies’ ability to continue charging for directory assistance calls above the statutory allowance set forth in G.L. 159, § 19A.

The Department should continue the historical link between E911 wireline services and excess directory assistance revenues at least as long as an E911 wireline deficit exists. The Department should amend its proposed E911 wireline regulations to require telephone companies

---

<sup>3</sup> During the public hearing, the Department said that the SETB makes an initial decision on whether an E911 service expense was a prudent expenditure. Tr., p. 30. The Department, however, retains an oversight obligation to review all SETB E911 expenses for prudence and public interest under Chapter 239 of the Acts of 2002.

<sup>4</sup> See, e.g., Verizon DTE MA Tariff No. 10, Part M Section 1.5.7, Directory Assistance Service.

to apply any directory assistance revenues they collect after January 1, 2003, in excess of the directory assistance call allowances provided for by G.L. c. 159, § 19A, first to recovery of the telephone company's E911 deficit. In the alternative, the Department should investigate whether excess directory assistance call revenues require an exogenous cost adjustment, reducing consumers' dial tone rates.<sup>5</sup>

#### **D. Conclusion**

For these reasons, the Department should adhere to its current standard of review for prudent E911 expenditures and should require telephone companies to apply their excess directory assistance revenues to their outstanding E911 deficits.

Sincerely,

Karlen J. Reed  
Assistant Attorney General  
Utilities Division  
Office of the Attorney General  
200 Portland Street, 4th Floor  
Boston, MA 02114  
(617) 727-2200

---

<sup>5</sup> The Department has determined that "exogenous costs should be defined as positive or negative cost changes actually beyond the Company's control and not reflected in the GDP-PI, including, but not limited to cost changes resulting from: changes in tax laws that uniquely affect the telecommunications industry; mandated jurisdictional separation changes; accounting changes unique to the telecommunications industry; and regulatory, judicial, or legislative changes uniquely affecting the telecommunications industry." *NYNEX*, D.P.U. 94-50, p. 182 (1995); *Boston Gas Company*, D.P.U. 96-50, p. 291 (1996).

**Rulemaking by the Department of Telecommunications and Energy, )  
pursuant to 220 C.M.R. §§ 2.00 et seq., to promulgate regulations to )  
establish a funding mechanism for wireline Enhanced 911 services, ) D.T.E. 03-24  
relay services for TDD/TTY users, communications equipment )  
distribution for people with disabilities, and amplified handsets at )  
pay telephones, as 220 C.M.R. §§ 16.00 et seq. )  
\_\_\_\_\_ )**

I hereby certify that I have this day served the foregoing document upon each person designated below by e-mail and either hand-delivery or mail.

Karlen J. Reed  
Assistant Attorney General  
Utilities Division  
200 Portland Street, 4th Floor  
Boston, MA 02114  
(617) 727-2200